IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.571 OF 2004
IN
SUMMARY SUIT NO.1732 OF 2004

Om Prakash Upadhyay ....Plaintiff
V/s.
Kamlesh S. Doshi, Karta of
Kamlesh S. Doshi, H.U.F. & Ors. ....Defendants

Mr.J.P. Sen with Mr.F. Dubash and Ms.Nita Solanki i/b Kiran Jain & Co. for the Plaintiff.

Mr.Sanjay Jain i/b Mr.Suresh Jain for Defendant Nos.1 to 3.

**CORAM : S.J. VAZIFDAR, J.**
**DATED : 23RD AUGUST, 2007.**

**P.C.** :

1. The suit is filed to recover a sum of Rs.7,85,779/- together with interest at 18% p.a.

2. The suit is filed to recover the price of the goods sold and delivered by the Plaintiff to the Defendants under the various invoices read with respective delivery challans.

3. The suit is also based on a balance confirmation letter. The balance confirmation letter is disputed. Mr.Sen, the learned counsel appearing on behalf of the Plaintiff stated that for the purposes

of this Summons for Judgment, he will not rely upon the balance confirmation letter.

4. Even ignoring the balance confirmation letter, there is no defence whatsoever to the suit. The Plaintiff's case is that the practice between the parties was that the goods would be delivered initially on approval basis and upon approval, the invoice would be sent and the goods would be considered sold.

5. It is important to note that the receipt of the goods and all the invoices is admitted. The aforesaid practice is therefore of little relevance in this case.

6. There is a bare denial in paragraph 6 of the affidavit in reply regarding receipt of the goods.

7. The denial however is ex-facie false. It is important to note that the Defendants have expressly admitted the receipt of invoices and the goods in the earlier part of paragraph 6 of the affidavit in reply which reads as under :-

> "I deny that the goods were delivered on approval basis, as alleged or otherwise.

> I say that goods received by defendants under said invoices were found to be defective, inferior, non-standard, un-salable and therefore defendants after analyzing the value of salable materials received under said invoices paid to the plaintiff a total sum of Rs.1,75,000/- and as such nothing is due and payable by defendants to plaintiffs in respect of said invoices. Such payment has been admitted by the plaintiff. There is no amount due or payable by the defendants to the plaintiff. I deny that there was any system of delivering goods on approval basis as alleged or otherwise. I deny that the invoices were raised, as alleged or otherwise." (emphasis supplied)

8. Thus the only defence is that the goods though received under the said invoices were defective. It is important to note that there is not a single letter or other document in which this grievance has been raised by the Defendants. The same has been raised in the affidavit in reply for the first time. The defence is false. It is established therefore that not only the invoices but even the delivery challans were received and the receipt of the goods was acknowledged by the Defendants signing the delivery challans.

9. In the circumstances on merits there is absolutely no defence to the Plaintiff’s claim.

10. It is then submitted that the suit is based on the amounts due at the foot of the account and nothing else. The submission merely requires to be stated to be rejected. For instance in paragraph 8 of the plaint, it is expressly stated that the claim is also on the basis of the invoices and delivery challans which constitutes a written contract between the parties for maintaining the suit under Order XXXVII of the Code of Civil Procedure.

11. The Defendants stated that at least half claim is barred by limitation. This contention is also without any substance. It is pertinent to note that the Plaintiff's advocates notices demanding payment were not replied to. Admittedly part payments aggregating to Rs.1,75,000/- were made on 25.8.2001, 6,6,2002, 8.6.2002, 2.11.2002 and 6.10.2003. The Plaintiff is entitled to appropriate the same in such a manner as he desires. By virtue of such part payments also the bar of limitation, if any, is saved.

12. In the circumstances, leave to defend is refused, the Summons for Judgment is made absolute and the suit is decreed as prayed.

The order dated 6.6.2006 shall continue for a

period of eight weeks from today.